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## **From international law to national law: The opportunities and limits of contractual CSR supply chain governance**

Kasey McCall-Smith and Andreas Rühmkorf<sup>1</sup>

### **I. Introduction**

Transnational Corporations (TNCs) with global supply chains regularly incorporate a supplier code of conduct into their relations with their suppliers.<sup>2</sup> These codes stipulate Corporate Social Responsibility (CSR) obligations. Whilst there are different methods of incorporating supplier codes of conduct into the supply chain, a common method is through contracts, which is the focus of this chapter. Hard and soft international law instruments such as International Labour Organization (ILO) conventions and the UN Global Compact often feature in documents such as the supplier codes of conduct.

This chapter explores the potential gap-bridging role of contract law as a means of giving force to international CSR standards, through the imposition of CSR obligations on companies in other countries through supply chain contracts. Therefore the discussion considers the ways in which CSR standards can become an enforceable part of a contract. It will assess the opportunities and limitations that the use of and reference to international law instruments in supply contracts provides for the promotion of CSR in global supply chains. The chapter focuses on English law, the frequent law of choice in international sales contracts, even where neither of the contracting parties is UK-based.<sup>3</sup>

The chapter is divided into three parts. The first is the data analysis of the practice of using contract law as an instrument for imposing international standards on suppliers. Supplier codes of conduct and, where available, terms and conditions of purchase of 30 FTSE100 companies are examined. This analysis reveals the international law standards most commonly referenced by TNCs vis-à-vis their suppliers. We examine how these standards are used in supplier contracts, i.e. are the international standards simply mentioned in the supplier code of conduct by general or specific reference or are they expressly incorporated into supply chain contracts.

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<sup>2</sup> Details of data analysis on file with the authors. S Skadegaard Thorsen, S Jeppensen, 'Changing Course – A Study into Responsible Supply Chain Management' (Global CSR and Copenhagen Business School for the Danish Ministry 2011) 9.

<sup>3</sup> See E McKendrick, *Contract Law* (8<sup>th</sup> edn, Palgrave Macmillan 2009) 10.

The second part then critically assesses the business practice of incorporating international standards into supply contracts from both a public international law and a contract law perspective. It explores the opportunities and the limitations that this linkage provides for the promotion of CSR in global supply chains. Issues that this practice raises from an international law perspective are, *inter alia*, the barriers to applicability in international law as well as the respective use of hard and soft law instruments. From a contract law perspective, the linkage of international and national law concerns issues such as drafting, incorporation, enforcement and the privity of contract doctrine.

Thirdly, the chapter assesses the implications of this international law – national contract law interaction in the context of CSR in global supply chains. This assessment includes the hybridised regulatory system that is created and the important role of legislation on CSR in global supply chains in the home-States of TNCs (such as transparency laws) as well as adequate enforcement mechanisms.

In terms of its terminology, the chapter refers to both the supply chain management of TNCs and to supply chain contracts. Supply chain management is the planning and management of all activities involved in sourcing and procurement, and all logistics management activities. It also includes coordination and collaboration with partners, particularly suppliers.<sup>4</sup> The literature on supply chain management thus usually focuses on issues such as purchasing, cost and quality of the goods.<sup>5</sup> The inclusion of CSR policies in supply chain management by companies is referred to as responsible supply chain management.<sup>6</sup> To that end, companies usually develop a supplier code of conduct, which they incorporate into their relationships with their suppliers in different ways and to varying legal effects.<sup>7</sup> One way of including the supplier code of conduct in the relationship with the supplier company is through contracts since contract law provides the framework for the purchasing of goods.<sup>8</sup>

This chapter contributes to the existing literature that analyses the use of CSR in supply chain contracts by focusing on the use of international law standards, which is an issue that has, so far, only played a minor role in the academic literature. There is significant literature on the

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<sup>4</sup> See for an introduction into supply chain management S Chopra and P Meindl, *Supply Chain Management: Strategy, Planning, and Operation* (5th edn, Pearson 2013).

<sup>5</sup> R M Monczka et al, *Purchasing & Supply Chain Management* (South-Western 2010).

<sup>6</sup> See M van Opijnen, J Oldenziel, 'Responsible Supply Chain Management: Potential Success Factors and Challenges for Addressing Prevailing Human Rights and other CSR Issues in Supply Chains of EU-based Companies' (CREM and SOMO for the European Commission 2011).

<sup>7</sup> A Millington, 'Responsibility in the Supply Chain' in A Crane, A McWilliams, D Matten et al. (eds), *The Oxford Handbook of Corporate Social Responsibility* (OUP 2008) 365.

<sup>8</sup> *ibid*, 358.

incorporation of CSR in supply chain contracts which primarily consists of doctrinal, socio-legal and empirical studies of the use of CSR in such buyer-supplier contracts.<sup>9</sup>

## II. The use of international law standards in global supply chains

In this section, the findings of data analysis of how listed, UK-based TNCs incorporate international law standards on CSR into their supply chain management are presented. The analysis covers Supplier Codes of Conduct and, where available, Terms and Conditions of Purchase of 30 FTSE100 companies.

The methodology employed involved the selection of 30 FTSE100 companies with an international supplier base and international operations. We examined TNCs' Supplier Codes of Conduct, Standard Terms of Conditions of Purchase or any other additional information on the TNCs' use of international CSR standards. Given their size and public standing, FTSE100 companies were selected due to the amount of publicly available information on their websites. Table 1 shows a preponderance of the secondary and tertiary economic sectors among the companies selected due to the decreasing size of the primary economic sector in developed countries.

The documentary sources analysed by the authors 'provide a rich source of data'<sup>10</sup> though the analysis inevitably is influenced by the nature of the documents. As such, the key inquiry was the content and wording of the documents in terms of international CSR standards. For example, we were interested to understand how contract law may or may not give legal force to international CSR standards; therefore, stringency was a criterion against which the wording of the documents was examined.

This approach has limitations and advantages. A limitation is that the companies were selected expressly due to their international operations, not randomly chosen. Also, whilst all companies published their supplier codes of conduct online, few publicised their Standard Terms and Conditions of Purchase. We focused on documents in the public domain as

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<sup>9</sup> See for example, K Peterkova Mitkidis, *Sustainability Clauses in International Business Contracts* (Eleven International Publishing 2015); L Vytopil, *Contractual Control in the Supply Chain: On Corporate Social Responsibility, Codes of Conduct, Contracts and (Avoiding) Liability* (Eleven International Publishing 2015); A Beckers, *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law* (Hart 2015); F Cafaggi, 'Regulation through Contracts: Supply-Chain Contracting and Sustainability Standards' (2016) 12 ERCL 1; D McBarnet and M Kurkchiyan, 'Corporate Social Responsibility through Contractual Control? Global supply chains and 'other regulation' in D McBarnet, A Voiculescu, T Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (CUP 2007) 59.

<sup>10</sup> L Webley, 'Qualitative Approaches to Empirical Legal Research', in P. Cane & H. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 938.

transparency is a cornerstone of effective CSR.<sup>11</sup> It is therefore possible that companies use international CSR standards in ways that are not visible from an outside perspective.

The advantage of documentary analysis is that it allowed us assess a larger set of companies than would have been possible through an in-depth study of few companies. This provided greater insight on the actual use of international CSR standards by leading UK-listed companies. Thus examining these documents enabled detection of similarities and differences from a larger sample and greater insight not only how often international standards are used, but also how they are used, such as through direct incorporation into a supplier code of conduct. Effectively, documents were examined to determine how they used international CSR standards, such as whether the supplier code is based on a particular international standard, the results of which are shown in table 2. Furthermore, doctrinal legal assessment of the documents underpins the following analysis about the wording and enforceability of these documents.

Table 1 below shows the economic sector and business areas of the companies examined representing a cross-industry study, including: pharmaceuticals, retail, fashion, mining, oil and gas, and telecommunication. The focus is the information they publish about CSR in their supply chain, particularly their supplier code of conduct, and what these documents say about international CSR standards. Both CSR and/or sustainability sections of each website were examined as it appears that in business practice these terms are increasingly used interchangeably.<sup>12</sup> CSR/Sustainability reports were not examined as our analysis focussed on the ways TNCs use international CSR standards vis-à-vis their suppliers and these reports contain little information that adds to the aim of the analysis.

Our understanding of CSR is based on two definitions: First, the definition adopted by the European Commission in its 2011 Communication on CSR in which it defines CSR as ‘the responsibility of enterprises for their impacts on society’.<sup>13</sup> Whilst this definition shows that

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<sup>11</sup> UN Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, UN Doc HR/PUB/12/02 (2012) 25.

<sup>12</sup> The Institute for Human Rights and Business (IHRB) uses the terms interchangeably, see S Skadegaard Thorsen, ‘Are Current Approaches to Responsible Supply Chain Management Working?’ (IHRB, 12 August 2010) <<https://www.ihrb.org/focus-areas/commodities/commentary-current-approaches-responsible-supply-chain-management-working>> accessed 25 May 2018; R Strand, RE Freeman and K Hockerts, ‘Corporate Social Responsibility and Sustainability in Scandinavia: An Overview’ (2015) 127 *Journal of Business Ethics* 1, 2.

<sup>13</sup> European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility’ COM (2011) 681 final, para 3.1.

CSR can be both mandatory and voluntary, it does not say much about its content. We, therefore, also adopt the following definition from Campbell and Vick:

At a minimum the term implies an obligation on the part of large companies to pursue objectives advancing the interests of all groups affected by their activities – not just shareholders but also employees, consumers, suppliers, creditors and local communities. These interests are not just economic, but also include environmental, human rights and ‘quality of life’ concerns. The obligation to be socially responsible is usually conceived of as being over and above the minimum requirement imposed on companies by formal legal rules, although this is not invariably the case.<sup>14</sup>

**Table 1: Sectors and business areas of the 30 companies**

<b>Primary</b>	<b>Secondary</b>	<b>Tertiary</b>
<i>Mining</i>  Anglo American, BHP Billiton, Randgold, Rio Tinto	<i>Retail and consumer goods</i>  Diaego, Marks & Spencer, Next, Reckitt Benckiser, Unilever, Tesco, Burberry, British American Tobacco, Imperial Brands, Sainsbury’s	<i>Hotels</i>  Intercontinental Hotels
	<i>Defence, automobiles, automotive / aerospace components</i> GKN, BAE Systems, Rolls Royce	<i>Outsourcing and communications</i> Bunzl, British Telecom Group, Vodafone
	<i>Pharmaceuticals &amp; medical equipment</i> Astra Zeneca, GlaxoSmithKline, Hikma Pharmaceuticals, Smith & Nephew	<i>Inspection and product testing</i> Intertek
	<i>Chemicals</i>  Johnson Matthey	
	<i>Energy industry and petroleum</i>  Centrica, Royal Dutch Shell, BP	

<sup>14</sup> K Campbell, D Vick, ‘Disclosure Law and the Market for Corporate Social Responsibility’ in McBarnet, et al. *The New Corporate Accountability*, 242.

Table 2 presents the frequency that different international CSR standards are used in the supply chain documents of the 30 companies assessed. Where the documents such as the supplier code of conduct refer to more than one international standard, each standard mentioned was counted. The issue of referencing more than one standard (combination of different standards) is addressed below.

**Table 2: Frequency of incorporation / reference to international CSR standards**

<b>International CSR standard</b>	<b>Frequency of use</b>
Universal Declaration of Human Rights	19x
International Labour Organisation conventions/labour standards	19x
UN Global Compact	17x
Ethical Trading Initiative Base Code	6x
The UN Guiding Principles on Business and Human Rights	5x
OECD Guidelines for Multinational Enterprises	4x

This analysis revealed the following findings. First, the supply chain documents analysed demonstrate a widespread reference to international CSR standards. Twenty-nine of the 30 companies analysed refer to or incorporate different international CSR standards into their supplier codes of conduct.<sup>15</sup> Second, table 2 conveys that the most widely referenced international documents are the United Nations' Universal Declaration of Human Rights (UDHR), the conventions and labour standards set out by the International Labour Organisation (ILO) and the UN Global Compact. Third, we find that many TNCs state that the provisions in their supplier code of conduct are based on international CSR standards which are, in turn, labelled as 'reference points'.<sup>16</sup> By this the companies suggest that their supplier codes are based on one or more of the international standards in table 2. For example, this can mean that there are provisions, such as on forced and child labour, which are based on the principles found in the international standards to which the code makes reference. Fourth, the documents assessed address a range of CSR issues, from labour standards (e.g. working hours, prohibition of child and forced labour) to environmental issues and bribery. The frequent reference to variable international CSR standards indicates an interaction between

<sup>15</sup> The only company that does not refer to any international standard is BAE Systems. See for example BAE's Supplier Code of Conduct 'Supplier Principles: Guidance for Responsible Business 2016'.

<sup>16</sup> See for example Vodafone Code of Ethical Purchasing, Version 2.0, References.

public international law and national contract law in global supply chains. The remainder of this chapter assesses this interaction.

### **III. International law perspectives**

Global supply chains raise many issues in international law due to their transnational nature and the human capital that is part and parcel of all supply chains. Not only is the role of individuals in the supply chain a primary consideration, but the positive and negative influences of suppliers on the local population and environment in which they operate are also a concern. Thus, from an international legal perspective, there is a clear opportunity to contribute to the social and economic development of the local community through entrenchment of human rights, the rule of law, poverty alleviation and sustainable development, reflecting the broad range of international agreements covering these topics.<sup>17</sup> However, due to poor implementation and enforcement of State's international obligations or the absence of national law, international standards for the protection of individual's rights and the environment are often ignored by supply chain contributors in order to maximise the economic value of their input. This pits economic value against societal values and is the tension that responsible supply chain management must navigate. As the last three decades of business and human rights discourse have revealed, while the international community continues to establish legal standards of human rights protection, the only actors from which it may demand compliance are States.

In the increasingly globalised world, international law is, however, slowly adapting to evolving actors on the international legal plane. While sovereignty and the supremacy of the State remains a guiding principle, international law and practice has engendered a gradual increase in legal personality for individuals, international organisations and TNCs.<sup>18</sup> These three categories of international actors relate uniquely to the consideration of global supply chains and their management. This section considers how international law struggles to ensure responsibly managed supply chains and the role of variable forms of international law relied

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<sup>17</sup> See for example ILO Resolution Concerning Decent Work in Global Supply Chains, Conclusions (105th Session, Geneva 8 July 2016) paras 1-2; Traidcraft/CORE, 'Above the Law? Time to Hold Irresponsible Companies to Account' November 2015 <<http://www.traidcraft.co.uk/media.ashx/above-the-law-nov-15-final.pdf>> accessed 23 May 2018.

<sup>18</sup> The present authors have elaborated this elsewhere, K McCall-Smith, A Rühmkorf, 'Reconciling Human Rights and Supply Chain Management through Corporate Social Responsibility' in V Ruiz Abou-Nigm, K McCall-Smith, D French (eds), *Linkages and Boundaries in Private and Public International Law* (Hart 2018) 147 – 173.



upon in the context of protecting against supply chain mismanagement. It begins with a brief overview of international legal actors and how international law endows each with limited rights and duties. It then proceeds to examine a number of international laws designed to improve the relationship between corporate activity and individual human rights holders through global supply chain management. Finally, the relationship between international law and contract law in protecting against irresponsible supply chain management will be introduced.

## **1. Addressing Actors in Global Supply Chains**

The inability of public international law to regulate global supply chains stems from its very nature as a body of law designed to govern relations between States. Admittedly, this definition is no longer strictly applicable,<sup>19</sup> yet the adjudicatory mechanisms of international law remain, strictly speaking, open to States or, in the realm of human rights, open to individuals in claims against States. Accessing justice against a transnational corporation directly at the international level is not currently an option and therefore other legal approaches, including actions in tort and contract law at the national level, are inevitably necessary to construct an accountability framework. International human rights courts, such as the European Court of Human Rights and the Inter-American Court of Human Rights have permitted a minor circumnavigation of this situation in limited circumstances where a State facilitated or was complicit in permitting a corporation to act in a way that impeded the rights of individuals. These cases have generally been framed as environmental harms resulting in a breach of human rights similar to private law tort claims or nuisance claims for conduct occurring within – or, in the case of the Inter-American Court of Human Rights, across – States' borders.<sup>20</sup>

This line of opinion is limited and does not expressly respond to the core problems of supply chain management, which typically involves breaches of human rights, environmental laws, anti-corruption laws and/or labour protections in a foreign State where the supplier is located. When the harm takes place in a foreign State, a further impediment arises in that the principle of non-extraterritoriality prevents application of home-State laws outside its jurisdiction against nationals of the foreign host-State. In extremely limited situations, this impediment

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<sup>19</sup> R Higgins, *Problems & Process: International Law and How to Use It* (Oxford, Clarendon Press, 1995) 12.

<sup>20</sup> For example, *Taşkin v. Turkey* (2006) 42 EHRR 50; *Öneryıldız v. Turkey* (2004) 41 EHRR 20; *Lopez Ostra v. Spain* (1994) 20 EHRR 277; Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-23/17 on Environment and Human Rights, 7 February 2018.

may be overcome, such as provided by the Alien Tort Statute in the US, which permits tort claims by foreign victims against foreign perpetrators committing violations of the law of nations on foreign soil – the ‘foreign-cubed’ claim.<sup>21</sup> While viewed as a law of great potential by human rights lawyers, most general international lawyers view foreign-cubed claims as a challenge to the principle of extraterritoriality or question the ability of individuals to raise breaches of international agreements in a national court.<sup>22</sup>

Still, it has been acknowledged that allowing a State to commit human rights violations on the territory of another State would be ‘unconscionable’ therefore it seems logical to assume that permitting a corporate actor to breach home-State laws in the territory of another State would also be viewed as such.<sup>23</sup> While logical, the legal extrapolation of such a position in terms of corporate actors is not straightforward due to the failure of international law to accommodate corporate actors in the accountability processes, save in extremely limited exercises of diplomatic protection or in the aforementioned cases where the State serves as the surrogate for the corporate environmental harm perpetrator.

Recently, a further advance was made when the Inter-American Court of Human Rights took a view on transboundary environmental harm that breached human rights obligations across borders. But again, in this instance the State was the perpetrator of the harm, rather than a corporate actor, and the individual harmed was deemed to be under the perpetrating State’s authority, responsibility or control for purposes of jurisdiction.<sup>24</sup> The case is interesting as the extraterritorial application of the human rights treaty in question tracks an argument not dissimilar to that required to overcome the jurisdictional barriers to corporate accountability for human rights abuse in global supply chains. Namely, that the home-State obligations are binding outside its own territorial jurisdiction which requires a legal fiction to be created to overcome the jurisdictional impediment. In the Inter-American case, this was done by crafting a limited agency relationship between the perpetrating State and the victim despite the victim

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<sup>21</sup> ‘Foreign cubed’ refers to a foreign defendant committing a human rights violation against a foreign person in a foreign country, see SM Grant, D Zilka, ‘The Rise of Foreign Investors in Federal Securities Class Actions’ in *Securities Litigation & Enforcement Institute* 2004, 91, 96 (PLI Corp. Law & Practice, Course Handbook Ser. No. B-1442, 2004) as cited in M Steinitz, ‘The Case for an International Court of Civil Justice’ (2014) 67 *Stanford Law Review Online* 75, 78, n 20. See discussion in McCall-Smith, Rühmkorf, ‘Reconciling Human Rights’, 154-55.

<sup>22</sup> SD Murphy, ‘Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?’ in D Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement* (CUP 2009).

<sup>23</sup> Human Rights Committee, Communication No R.12/52, *López Burgos v. Uruguay*, UN Doc A/36/40 (1981) 176. See J Cerone, ‘Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US Activities in Iraq’ (2005) 9 *ASIL Insights* 32.

<sup>24</sup> IACtHR, Advisory Opinion OC-23/17.

otherwise having no tie to the perpetrating State. However, the focus on the State as the responsible perpetrator due to its act or omission maintains the heretofore existing legal hurdle in that corporations cannot directly be held accountable in the international system.

Recognising the ‘continuous evolution in international law’ in the *Barcelona Traction* case, the ‘considerable influence on international relations’ was highlighted by the International Court of Justice (ICJ) as a reason necessitating that States give greater consideration to the growing body ‘of rules governing the creation and operation of corporate entities’ – entities which hold their own rights and responsibilities as legal actors.<sup>25</sup> The logic of *Barcelona Traction* resonates in the twenty-first century struggle with supply chain governance in light of the above difficulty in holding corporations accountable at the international level. Notably, the idea that the volume of rules governing corporations would increase is a starting point for this discussion. The nature of these rules in terms of operation is represented by two distinct areas of law: domestic legal regulations and international law. Simultaneously, there is an increasing cadre of treaties demanding that the State protect individuals against harm from third parties.<sup>26</sup> In general, the various rules can be viewed as preventative. The key difficulty is that parallel rules responding to violations of the preventative standards in terms of access to justice at the international level have not increased in any meaningful way and remain limited at the domestic level. Until there is a marked shift at the international level, one way of addressing the inequality between rule and redress in the public international law field is contract law since individual claims against corporations operating in a foreign State have difficulty getting to trial.<sup>27</sup> Whereas tort law focuses on the harmed individual(s), a breach of contract claim under these circumstances can have an impact for the breaching supplier in the chain. This can be the case if the buyer procures a remedy for a breach of its CSR policy, including termination of the contract. Whilst, at least in the UK, there is no case law related to a violation of a CSR policy by a supplier yet, this does not mean that the use of contract law as an instrument of imposing CSR duties on suppliers would be futile. First, the existence of a remedy for a breach of a contractual term that incorporates a CSR policy into the buyer-

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<sup>25</sup> *Barcelona Traction* case (*Belgium v. Spain*), 1970 ICJ Reports 3, para 39.

<sup>26</sup> For example: International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966; International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 16 December 1966; Convention on the Elimination of all forms of Discrimination Against Women, 1249 UNTS 13, 18 December 1979; Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989.

<sup>27</sup> J Zerk, ‘Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies. A Report Prepared for the Office of the UN High Commissioner for Human Rights’ (OHCHR 2012), 44, 94; P Zumbansen, ‘Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism’ (2012) 21 *Transnational Law & Contemporary Problems* 305, 305; Traidcraft/CORE, ‘Above the Law?’ 8.

supplier contract alone means that there is redress available, even if buyer companies choose not to use it, though enforcement will be variable and contingent on the nature of the clause and the law of the jurisdiction. Second, the fact that a CSR policy is contractual might lead the buyers to use their right to terminate a contract in case it is breached, but it might also lead to them not renewing the contract. As previous studies have shown, individual criminal and tort actions against corporations for abuse by suppliers or subsidiaries further down the supply chain are notoriously difficult.<sup>28</sup> The following section sets out a number of international laws and standards that are non-justiciable at the international level and then introduces key advances in ‘hardening’ these soft principles through contracts.

## **2. Relevant Law**

Because existing international treaties are unable to directly regulate corporate actors due to their limited international legal personality, soft law regimes have developed as a means of guiding States and businesses in their interactions with one another and their activity that directly impacts human rights. These soft regimes integrate elements of hard international law through explicit incorporation or direct reference, which serves to reinforce the obligations previously taken up by States.<sup>29</sup> Though soft law is often criticised as a weak form of governance or simply ‘not law’ due to its non-binding nature, it is undoubtedly the most prolific in terms of both form and governance in many areas of international law.<sup>30</sup> Not only is it much easier to agree due to the lack of prescribed formalities, the ability to capitalise on a multi-stakeholder approach that includes issue-specific experts aids in ensuring that soft laws can provide a greater depth than that which is generally agreed by diplomats in a negotiating forum – an issue of key importance in the examination of global supply chains due to the fast-paced nature of these operations.

Varying forms of international law offer key opportunities to guide responsible global supply chain management and fill the gaps otherwise left by the international legal framework of human rights treaties. This chapter now considers the most-referenced international standards, identified in section II and why they seem to have the greatest pull in the corporate sector.

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<sup>28</sup> Zerk, ‘Corporate Liability’, Appendix 2. See discussion in A Chander, ‘Unshackling Foreign Corporations: Kiobel’s Unexpected Legacy’ (2013) 107 AJIL 829; Traidcraft/CORE, ‘Above the Law?’; Murphy has examined the issue of enforcing international obligations, including human rights, in domestic courts more generally, see Murphy, ‘Does International Law Obligate States’ 94 et seq.

<sup>29</sup> C Rodríguez-Garavito, ‘Business and Human Rights: Beyond the End of the Beginning’ in C Rodríguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (CUP 2017) 14.

<sup>30</sup> A Boyle, C Chinkin, *The Making of International Law* (OUP 2007) 212-13; J d’Aspremont, *Formalism and the Sources of International Law* (OUP 2011) 128-9.

The most widely referenced international documents are the UDHR, ILO standards and the UN Global Compact. However, as will be explained below, the UN Guiding Principles on Business and Human Rights: Implementing the UN ‘Protect, Respect and Remedy’ Framework (UNGPs) must also be considered as this is the fastest-growing point of reference across the overarching CSR regimes and in business practice (discussed below).<sup>31</sup>

#### **a) The UDHR**

Adopted 70 years ago, the UDHR is the genesis of all human rights treaties and though it is not a binding instrument, many of its norms are binding either through customary international law or have been codified in a treaty. Most of the abuses suffered as a result of poor supply chain management are directly addressed in the UDHR, including: non-discrimination, the prohibition against torture, the right to life, the prohibition against slavery, the right to effective remedy, freedom of opinion and expression, freedom of association, etc. That two-thirds of the TNCs examined in our survey sample (section II) refer to the UDHR is unsurprising as it is the most widely available human rights document in the world and the umbrella for the modern human rights system and is consistently referenced by all UN organs. The frequency with which the document is referred to in both international and national governance structures facilitates the ease with which corporations have professed their commitment to its principles.<sup>32</sup> In line with traditional international law, it expressly refers to the UN Members States and their pledge to observe and promote the UDHR standards of achievement with no mention of corporate actors.

#### **b) ILO Conventions and Policies**

The ILO has facilitated the adoption of around 200 conventions and protocols addressing a wide range of labour issues, including those endemic to poor supply chain management, such as child labour, modern slavery, collective bargaining, equal pay, among many others. The ILO’s tripartite structure incorporates both employer and employee concerns and is dedicated to the improvement of workplace conditions; therefore, these standards are a natural point of reference for TNCs, as borne out by the frequency of reference indicated in section II. There is a great deal of overlap between ILO instruments and the UDHR in terms of rights

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<sup>31</sup> UN Guiding Principles on Business and Human Rights, UN Doc A/HRC/17/31 (21 March 2011) annex (UNGPs). See Rodríguez-Garavito, ‘Business and Human Rights’; A Sanders, ‘The Impact of the “Ruggie Framework” and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation’ in J Martin, K E Bravo, *The Business and Human Rights Landscape: Moving Forward, Looking Back* (CUP 2015).

addressed. None of the ILO conventions, however, place a duty on corporate actors to observe the standards set out therein and, in line with traditional international law, the onus lies on States to enforce convention standards. While the duty on States is clear, the number of States ratifying the individual conventions varies wildly, thus the TNC at the top of the supply chain and the suppliers toward the bottom will not necessarily be party to the same, if any, of the ILO conventions. Furthermore, many of the most technical forms of guidance by the ILO is issued in a non-binding form. For example, the ILO adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO MNE Declaration), and it is incumbent on all ILO Member States to observe the principles set down therein. The 2017 iteration of the Declaration, generally tracks the development of the business and human rights discourse at the international level. It is intended to address key issues in the context of global supply chains and the recent revision expressly incorporates the 2030 Sustainable Development Goals and the UNGPs. The document aims to encourage multinational enterprises to make positive contributions to economic and social progress through the realisation of decent work. Equally, the ILO Declaration on Fundamental Principles and Rights at Work and its concomitant follow-up procedure commits its Member States to respect and promote core rights that are intrinsic to responsible supply chain management, including: freedom of association, the prohibition against forced and child labour, among many others.<sup>33</sup> Furthermore, the ILO has examined the issue of global supply chains and adopted express conclusions on work in global supply chains.<sup>34</sup> Due to the tripartite nature of the ILO and its substantive engagement with employers, it is not surprising that general references to its standards are frequently referenced by corporations in their supply chain management policies.

### **c) UN Global Compact**

Our assessment of the supply chain policies confirms that the UN Global Compact is another key point of reference used by TNCs. It is the longest-running and largest voluntary corporate sustainability initiative providing a minimum level of social and environmental standards through its Ten Principles.<sup>35</sup> The Ten Principles<sup>36</sup> are drawn from the UDHR, the ILO Declaration on Fundamental Principles and Rights at Work, as well as environmental and

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<sup>33</sup> ILO, Declaration on Fundamental Principles and Rights at Work, 18 June 1998, updated Annex 15 June 2010.

<sup>34</sup> ILO, Resolution Concerning Decent Work in Global Supply Chains, Conclusions.

<sup>35</sup> Ten Principles of the UN Global Compact, Introduction <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> accessed 21 August 2018.

<sup>36</sup> The ILO also expressly acknowledges the UN Global Compact as a partner in its work on global supply chains.

anti-corruption agreements.<sup>37</sup> The Principles expressly track the four core labour rights set out in the ILO Declaration on Fundamental Principles and Rights at Work. The Compact aims to guide businesses at every stage of the value chain and its Guide to Corporate Sustainability further clarifies that a healthy business demands that businesses proactively manage their value chains to ensure the well-being of workers, the communities in which they operate and the planet.<sup>38</sup> The sheer reach of the Global Compact network justifies the high level of reference in supply chain management policies.

#### **d) UN Guiding Principles on Business and Human Rights**

No examination of contemporary reference points for CSR standards and supply chain management would be complete without introducing the UNGPs. While not the most often directly referenced standards in the supply chain management codes of conduct we examined, the frequent reference to ILO policies and the Global Compact indirectly incorporate the UNGPs. Both explicitly have aligned with the guidance set out in the UNGPs, providing a framework for how to action the UN Protect, Respect and Remedy Framework on Business and Human Rights. The 2011 endorsement of the UNGPs by the Human Rights Council was viewed as a ‘watershed’ moment in the heretofore fractious relationship between human rights and the business community.<sup>39</sup> Government and business community support quickly coalesced to render the UNGPs the primary focus in business and human rights discourse and the foundation from which the future of the field would proceed.<sup>40</sup> The UNGPs were incorporated almost verbatim into the OECD *Guidelines for Multinational Enterprises* and are used as a point of reference for a growing number of international corporate social responsibility schemes.<sup>41</sup>

#### **e) Summary**

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<sup>37</sup> For example, Rio Declaration on the Environment and Development, UN Doc A/RES/66/288 (2012); UN Convention against Corruption, 31 October 2003, 2349 UNTS 41.

<sup>38</sup> UN Global Compact, ‘Guide to Corporate Sustainability: Shaping a Sustainable Future’ December 2014, 7.

<sup>39</sup> Human Rights Council, Resolution 17/4 ‘Human Rights and TNCs and other Business Enterprises’ UN Doc A/HRC/RES/17/4 (16 June 2011). Economist Intelligence Unit, *The Road from Principles to Practice: Today’s Challenges for Business in Respecting Human Rights* (2015).

<sup>40</sup> See generally, Rodríguez-Garavito, ‘Business and Human Rights’; Sanders, ‘The Impact of the “Ruggie Framework”’.

<sup>41</sup> OECD, ‘OECD Guidelines for Multinational Enterprises’ (OECD Publishing 2011). For the UNGPs as a point of reference, see Global Reporting Initiative (GRI), ‘G4 Guidelines and ISO 26000:2010 How to use the GRI G4 Guidelines and ISO 26000 in conjunction’ (January 2014); European Commission, ‘Commission Staff Working Document on Implementing the UN Guiding Principles for Business and Human Rights’ SWD(2015) 144, 14 July 2015.

The repeated reference to international standards supports the consolidation of consensus regarding the minimum standards of practice for businesses and human rights, which is at the heart of responsible supply chain management. In our sample, TNCs refer to a number of different international standards in their supplier codes of conduct. For example, Vodafone and AngloAmerican list, inter alia, the UDHR and ILO conventions as references for their Codes.<sup>42</sup> This combination of different standards suggests that companies base their codes on the most widely recognised international standards for issues of CSR. Whilst the combination *per se* does not have any contractual effect, it is probably used by the buyer companies to demonstrate both to the public (particularly consumers) and to their suppliers that CSR is important. Also, some of the standards have a slightly different focus and coverage (e.g. by definition, the ILO focuses on labour standards, whereas the Global Compact also addresses bribery) and therefore the combination ensures that the TNC seems to cover key CSR issues.

### **3. Overcoming the International Barriers**

In direct response to the growing international initiatives and the continuous stream of reports of business aggravating human rights, a number of States and even greater number of civil society voices have called for an international treaty addressing business and human rights.<sup>43</sup> This proposal has been met with criticism and, as currently framed, it is not difficult to see why as it does little more than add to an already substantial library of international treaties that are designed to protect human and labour rights.<sup>44</sup> A stronger approach would be to address incorporation of existing human rights obligations at the domestic level. Preventative domestic law can take two forms, national regulation or private contract. While there are examples of national regulations addressing issues of supply chain governance, they rest predominantly on self-reporting and transparency requirements, which are often ineffective or the law is riddled with loopholes that permit maintenance of the status quo.<sup>45</sup> Recent examples of national regulation focused on improving supply chain governance include: the US Dodd-

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<sup>42</sup> See Vodafone Code of Ethical Purchasing, Version 2.0 and AngloAmerican, Responsible Sourcing Standard for Suppliers (November 2016).

<sup>43</sup> Human Rights Council, 'Elaboration of an International Legally Binding Instrument on TNCs and Other Business Enterprises with Respect to Human Rights' UN Doc A/HRC/26/L.22/Rev.1 (26 June 2014); see Rodríguez-Garavito, 'Business and Human Rights', 32 et seq; Humberto Cantu Rivera, 'Negotiating a Treaty on Business and Human Rights: The Early Stages' (2017) 40 UNSWLJ 1200; Joylon Ford and Claire Methven O'Brien, 'Empty Rituals or Workable Models? Towards a Business and Human Rights Treaty' (2017) 40 UNSWLJ 1223.

<sup>44</sup> JG Ruggie, 'A UN Business and Human Rights Treaty?' An Issues Brief, Harvard University, 28 January 2014.

<sup>45</sup> See for an assessment of the UK Modern Slavery Act, A Okoye, 'Corporate Enterprise Principles and UK Regulation of Modern Slavery in Supply Chains' (2017) 28 ICCLR 196.



Frank Wall Street Reform and Consumer Protection Act;<sup>46</sup> the 2017 French Due Diligence Law;<sup>47</sup> and the 2015 UK Modern Slavery Act.<sup>48</sup> These regulatory acts each represent a step in the right direction, yet they fall short of promising comprehensive and effective supply chain management. In order to give tangible effect to the standards produced at the international level, responsible businesses are increasingly relying upon contracts to demand higher levels of socially sustainable performance from their suppliers.

## **V. Contract law perspectives**

From a contract law perspective, the use of and reference to international CSR standards raises issues such as the mode of incorporation, the drafting of the contractual terms related to CSR and enforcement. These will be addressed insofar as they are relevant to the underlying question of using international standards in private supply contracts.

### **1. Incorporation of the international CSR standards into supply chains**

The review of the 30 companies' codes of conduct will show in this section a range of different ways in which companies incorporate international CSR standards into their supply chains.<sup>49</sup>

The first and seemingly most frequent method is using the international standards as a reference point for the supplier code of conduct that the TNC imposes on its suppliers. The supplier codes of conduct of the TNCs at the top of the chain stipulate CSR obligations for their suppliers on issues such as forced and child labour, based on the principles found in the international standards that they used as 'reference point'. The stringency of the language in the codes themselves varies from more binding forms that require the contractual partners to meet these standards to more aspirational forms such as 'strive to...' <sup>50</sup> or 'we have established the aspiration that the working conditions in our supply chain should meet standards based on international guidelines.' <sup>51</sup> An example of this approach can be found in the supplier code of conduct of the company AngloAmerican which states:

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<sup>46</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, s 1504, Disclosure of payments by resource extraction issuers.

<sup>47</sup> Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1).

<sup>48</sup> UK Modern Slavery Act 2015, s 54(1).

<sup>49</sup> See for a general assessment of CSR in supply chain contracts in English law: A Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains* (Edward Elgar 2015) chapter 3.

<sup>50</sup> See AngloAmerican, Responsible Sourcing Standards for Suppliers, 2. Safety and Health: 'Suppliers therefore must: 2.1 Strive to eliminate fatalities, work-related injuries and health impairment of the workforce...'.

<sup>51</sup> See British Telecom, Generic Standard 18 Sourcing with human dignity, 1 Background.

External reference points: The following have been used as reference points and may be referred to by suppliers if additional detail is required: [then list of international standards follows].<sup>52</sup>

A further example of the reference to international standards in the supply chain documents is the following statement from Burberry:

We require all our supply chain partners, whether they are providing products or services, to agree with our Responsible Business Principles. These include the Burberry Ethical Trading Code of Conduct, Migrant Worker and Homeworker Policy. The Ethical Trading Code of Conduct is underpinned by the United Nations Universal Declaration of Human Rights, the Fundamental Conventions of the International Labour Organization and the Ethical Trading Initiative Base Code.<sup>53</sup>

Unilever takes a similar line by saying that the principles in its Responsible Sourcing Policy (RSP) are ‘not a Unilever “creation”. They are anchored in internationally recognised standards.’<sup>54</sup>

The second mode of incorporation is that the buyer companies require their suppliers to conduct their operation in a way that respects specific international CSR standards. For example, British American Tobacco states:

As such, we expect our suppliers to conduct their operations in a way that respects the fundamental human rights of others, as affirmed by the Universal Declaration of Human Rights.<sup>55</sup>

The wording used here is vague in that ‘respect’ does not mean ‘comply with’, so it can be argued that it falls short of a binding legal requirement. However, given that the buyer expects the supplier to respect these documents, there is room for discussion about the actual legal effect of this wording. Still, it can be argued, that the buyer could request its suppliers to ‘comply with’ a standard. So, at least, the examples here can be considered to be a business requirement. A question that we cannot assess by our documentary analysis is whether or not

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<sup>52</sup> AngloAmerican, Supplier Sustainable Development Code, 4.

<sup>53</sup> Burberry, Areas of Work: Labour and Human Rights, available at <<https://www.burberrypkc.com/en/responsibility/areas-of-work/labour-and-human-rights.html>> accessed 23 May 2018.

<sup>54</sup> Unilever, Unilever Responsible Sourcing Policy: Working in Partnership with our Suppliers, 6

<sup>55</sup> British American Tobacco, Supplier Code of Conduct, 5.

the buyer companies react differently in practice to the breach of a business and a legal requirement respectively.

The third approach is similar to the second approach, but it uses more stringent language as, in this scenario, the company expressly requires their suppliers to comply with international standards. For example, AstraZeneca (Pharmaceuticals) declares:

We expect our third parties to meet these strict standards, as set out in our Global Standard Expectations of Third Parties. Our Global Standard incorporates our Code of Conduct and key international standards, such as those published by the International Labour Organization (ILO).<sup>56</sup>

This overview demonstrates that international companies at the top of the supply chain make use of international CSR instruments vis-a-vis their suppliers in different ways. Whilst some of them use these documents as a source that underpins the content of their supplier code of conduct, others require respect of the principles of such standards while then again others expressly require compliance with them.

A related issue is the question under what circumstances CSR policies can become contractual terms. It would go beyond the scope of this chapter to address the issue in detail and this issue will therefore only be touched upon here briefly.<sup>57</sup> Insofar as UK TNCs are concerned, the primary means of making CSR clauses contractual between buyers and suppliers is through the Terms and Conditions of Purchase of the buyer.<sup>58</sup> Some companies include express CSR clauses directly in their terms and conditions, whereas others incorporate their supplier code of conduct into the terms and conditions by way of reference which then, in turn, often refers to the international law standards in the ways presented above.<sup>59</sup>

An example of the first approach, i.e. to include express CSR clauses, is in the Terms and Conditions of Purchase from GlaxoSmithKline. Clause 21, entitled ‘Ethical Standards and Human Rights’, contains a list of CSR obligations which are imposed on their suppliers. For example, the clause stipulates that the supplier warrants that ‘it does not employ engage or

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<sup>56</sup> AstraZeneca, Global Standard Expectations of Third Parties.

<sup>57</sup> Note to the editors: Please refer here to other chapters of this book that contain a doctrinal analysis of contract law.

<sup>58</sup> Rühmkorf, *Corporate Social Responsibility*, 87.

<sup>59</sup> *ibid.*

otherwise use any child labour in any circumstances...’ and ‘that it does not use forced labour in any form...’.<sup>60</sup>

An example of the latter approach can be found in the purchase order terms and conditions of Rio Tinto. Clause 10 stipulates that ‘the supplier will...(b) comply with Rio Tinto’s policy titled “The Way We Work”’.<sup>61</sup> In this case, the code of conduct is not a term of the contract, but a reference document which will help to determine whether the contractual term that refers to it is a condition, warranty or innominate term.<sup>62</sup> It is necessary to assess the provisions of the supplier code of conduct in order to determine whether or not the supplier has breached this contractual term. If the CSR clauses are effectively incorporated into the contract, then the supplier code of conduct can become enforceable on the supplier, depending on the wording of the CSR provisions.

The following section will assess some examples of provisions in supplier codes of conduct in order to assess whether or not these constitute contractual terms that can be breached.

Contract law has the power to give binding effect to otherwise soft and voluntary CSR instruments such as codes of conduct or international law soft instruments if it meets three criteria: First, such CSR clauses need to be effectively incorporated into the contract; second, the CSR provisions must be drafted in a binding way, so that alleged breaches by the supplier can be verified; and, third, the wording of the CSR provisions must be clear and unambiguous, as discussed in the next section. From a contract law point of view, these three issues are central; the status and purpose of the underlying standards in international law does not matter for their incorporation and enforcement in private contracts.

## **2. Are the CSR provisions binding and enforceable?**

As noted, the issue whether or not the CSR clauses are binding and enforceable depends on the way they are drafted in the contracts between buyers and suppliers. Due to the focus on publicly available documents in our analysis, we can only assess Terms and Conditions of Purchase here and not individual contracts as these are not published. This section will therefore critically assess some examples of such CSR provisions. We will consider three scenarios here. The first one is the direct inclusion of CSR clauses into the terms and conditions by GlaxoSmithKline. They contain some clear, binding and verifiable CSR clauses

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<sup>60</sup> GlaxoSmithKline, GlaxoSmithKline Terms and Conditions of Purchase, clause 21.

<sup>61</sup> Rio Tinto London Limited, Purchase Order for the Supply of Goods, Terms and Conditions, clause 10 (‘Compliance with law and policies’).

<sup>62</sup> See Rühmkorf, *Corporate Social Responsibility*, 87.

such as that the supplier ‘does not employ engage or otherwise use any child labour’ and that ‘it does not use forced labour in any form’.<sup>63</sup> The second scenario is that of incorporation of the supplier code of conduct by reference such as by Rio Tinto. However, although many companies seem to incorporate their supplier code of conduct into the contract by reference, it is important to consider that the wording of the supplier codes appears to differ significantly in terms of their stringency, so it is not possible to generalise. In the case of Rio Tinto, the section on ‘labour and human rights’ states the following:

We support the United Nations’ Universal Declaration of Human Rights. We work with suppliers who uphold fundamental human rights including: Ensuring all work is freely chosen; without the use of forced and compulsory labour.<sup>64</sup>

Whilst Rio Tinto’s statement indicates that it works with suppliers that do not use forced labour, it is a question of interpretation as to whether this provision requires suppliers to comply with this provision. This wording in Rio Tinto’s code does not amount to the level of bindingness that we find in the first scenario in GlaxoSmithKline’s terms and conditions which require the suppliers *warrant* that they do not employ forced labour.<sup>65</sup> Similarly, there is a significant difference between ‘We support the Universal Declaration of Human Rights’ and a wording that would state ‘we comply with...’. Therefore, it can be concluded that it might be difficult to prove a breach of the contractual CSR terms by Rio Tinto’s suppliers. This situation raises the question of whether or not these terms can be enforced in practice.

However, another company, Unilever demonstrates that it is, in principle, possible to impose binding CSR obligations on suppliers through a supplier code of conduct that is incorporated into the contract by reference. Unilever’s terms and conditions of purchase stipulate that:

Each supplier...acknowledges that it has reviewed Unilever’s Responsible Sourcing Policy (“RSP”) and agrees that all of their activities shall be conducted in accordance with the RSP.<sup>66</sup>

Still, the question of whether or not the CSR obligation is binding depends on the wording of the provision in Unilever’s RSP. In case it is not firm and clear it may be that there is a mismatch between the stringent incorporation of the policy into the contract and the wording

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<sup>63</sup> GlaxoSmithKline, GlaxoSmithKline Terms and Conditions of Purchase, clause 21.

<sup>64</sup> Rio Tinto, The Way We Work, clause 1.3.

<sup>65</sup> Ibid.

<sup>66</sup> Unilever, General Terms & Conditions of Purchase of Goods of Unilever Supply Chain Company AG (“Conditions”), clause 13.

of the actual policy itself. In the case of Unilever, the sourcing policy contains mandatory requirements and continuous improvement benchmarks. One of the mandatory requirements is the following provision:

Work is conducted on a voluntary basis: Forced labour, whether in the form of indentured labour, bonded labour or other forms, is not acceptable. Mental and physical coercion, slavery and human trafficking are prohibited.<sup>67</sup>

This provision is binding on the supplier and a violation of this wording can be verified as the supplier ‘agrees that all of their activities shall be conducted in accordance with the RSP’. Therefore, Unilever is an example where the supplier code of conduct contains clear and binding obligations that it imposes on the supplier and which can be used to determine whether or not the supplier has breached a contractual term.

Finally, the third scenario concerns that of compliance with an international CSR standard. An example of this approach can be found in the code of conduct of British American Tobacco (BAT) which states:

...As such, we expect our suppliers to conduct their operations in a way that respects the fundamental human rights of others, as affirmed by the Universal Declaration of Human Rights.<sup>68</sup>

Their terms and conditions of purchase are not available online, but BAT states on its website that its supplier code of conduct defines ‘the minimum standards we expect our suppliers to adhere to in order to supply goods or services to BAT and any BAT Group company.’<sup>69</sup> Therefore, it appears that suppliers have to adhere to the principles of the UDHR and that it is down to the wording of this document to determine whether or not a BAT supplier has violated the company’s supplier code of conduct. UDHR Article 4 reads: ‘No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.’ This wording is clear, strict and a violation of it can thus be verified. It can thus be argued that suppliers are obliged to comply with this Article, given that BAT establishes an expectation to adhere to the principles of the UDHR. This is an important finding, as the Declaration thereby gains binding legal effect between the contractual parties of the supply agreement (i.e. the TNC as the buyer and its supplier) through contract law. BAT is therefore able to enforce this

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<sup>67</sup> Unilever, Responsible Sourcing Policy: Working in Partnership with Our Suppliers.

<sup>68</sup> British American Tobacco, Supplier Code of Conduct, 5.

<sup>69</sup> British American Tobacco, ‘Policies, Principles and Standards’ <<http://www.bat.com/principles>> accessed 23 May 2018

principle by applying the usual instruments of contract law, which are primarily damages in the case of English law.<sup>70</sup> Also, in those cases where the breach of a contractual term concerns a condition, the breach is considered to be repudiatory and the non-breaching party gains the right to terminate the contract.<sup>71</sup>

### **3. Enforcement of the CSR provisions down the chain and by third parties**

The next issue is how these contractual CSR provisions can be enforced. Here, two scenarios must be distinguished. First, the enforcement down the chain onto suppliers and sub-suppliers; secondly, the enforcement by the employees of the suppliers who are the intended beneficiaries of the contractual CSR terms in the contracts between buyers and suppliers. Enforcement is only possible if the Terms and Conditions of Purchase that contain the CSR provisions are indeed part of the contract. In English law, the rules on unfair commercial contract terms cannot make invalid CSR policies included in the contracts between buyers and their suppliers as these rules primarily focus on business-to-consumer relationships.<sup>72</sup> The validity of such clauses is, however, discussed in other legal systems such as in German law.<sup>73</sup>

In case the supplier is in breach of a contractual CSR term, the buyer can procure a remedy. However, here it must be noted that in English law (and in common law generally) the primary remedy against the party that is in breach of a contractual obligation is the right to demand damages.<sup>74</sup> If the seller has breached a condition then the buyer can procure the right to repudiate the contract, i.e. terminate it.<sup>75</sup> This situation differs from civil law jurisdiction where the usual remedy is to force the defaulting party to perform the contract.<sup>76</sup> The remedy of specific performance is rarely awarded in English law.<sup>77</sup>

The enforcement down the chain onto sub-suppliers is an important issue for the actual reach of the CSR commitments as global supply chains are often complex and long. Many TNCs at the top of the chain do not directly contract with all the suppliers in their chain. Rather, the

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<sup>70</sup> See N Andrews, *Contract Law* (2<sup>nd</sup> edn, CUP 2015) chapter 18.

<sup>71</sup> See Rühmkorf, *Corporate Social Responsibility*, 108.

<sup>72</sup> See the statutory framework: The Unfair Contract Terms Act 1977, The Unfair Terms in Consumer Contracts Regulation 1999, The Sale of Goods Act 1979, The Supply of Goods and Services Act 1982 and The Consumer Credit Act 1974.

<sup>73</sup> See B Spießhofer and F Graf von Westfalen, 'AGB-Recht, CSR-Klausel, Corporate Social Responsibility, Inhaltskontrolle' (2015) *Betriebs-Berater* 75.

<sup>74</sup> JM Smits, *Contract Law: A Comparative Introduction* (Edward Elgar 2014) 194.

<sup>75</sup> J Poole, *Textbook on Contract Law* (11<sup>th</sup> edn, OUP 2012) 57-9.

<sup>76</sup> Smits, *Contract Law*, 194.

<sup>77</sup> R Stone, *The Modern Law of Contract* (9<sup>th</sup> edn, Routledge 2011) para 15.9.

supply chain management often establishes a complex supply chain, consisting of different tiers of suppliers and sub-suppliers.

However, contract law concerns, first and foremost, the parties of the contract. The privity of contract doctrine stipulates that it is a general rule that third parties cannot be subjected to a burden by a contract to which they are not a party.<sup>78</sup> Therefore, the sub-suppliers that are not party of the contract between the TNC and their direct contractual partners are not bound by the supplier code of conduct. This means that they are beyond the direct reach of this contract. It is not possible for the corporation at the top of the chain to directly impose CSR obligations onto sub-suppliers. This situation significantly limits the practical effects and thus the power of contract law as an instrument of promoting CSR.<sup>79</sup>

The second scenario concerns the issue of enforcement by third parties, in particular, the employees of the suppliers who could be seen as the intended beneficiaries of the contractual CSR clauses.<sup>80</sup> The practical effect of these CSR clauses across the chain would be stronger if these third parties were to acquire a right to enforce them. Traditionally, in English law, third parties were unable to enforce a contract that they are not party of, even if that contract has been expressly entered into for their benefit due to the privity of contract doctrine.<sup>81</sup>

The Contracts (Rights of Third Parties) Act 1999 opens up the possibility for such third parties to derive a right of enforcement. The first avenue for such a right is that a term of the contract expressly provides that the third party may enforce a right in its own right.<sup>82</sup>

However, none of the Terms and Conditions of Purchase of the companies analysed here contained such a provision. Alternatively, a third party who is not party to a contract may enforce a contractual term if the term purports to confer a benefit on him.<sup>83</sup> The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.<sup>84</sup> In *Prudential Assurance Co Ltd v Ayres*, these conditions were interpreted as meaning that ‘on a true construction of the term in question its sense has the effect of conferring a benefit on the

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<sup>78</sup> Andrews, *Contract Law*, 175.

<sup>79</sup> It is often argued by civil society that due to their size and the numbers of their orders, TNCs have a strong bargaining power in practice which they could use to impact on working conditions further down their supply chain irrespective of the actual reach of their contracts with their direct suppliers. This issue is beyond the analysis of contract law here, however.

<sup>80</sup> For detailed discussion, see chapter xx in this volume.

<sup>81</sup> See *Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co Ltd* [1915] AX 847.

<sup>82</sup> Contracts (Rights of Third Parties) Act 1999, s1 (1) (a).

<sup>83</sup> Contracts (Rights of Third Parties) Act 1999, s1 (1) (b).

<sup>84</sup> Contracts (Rights of Third Parties) Act 1999, s3.



third party in question.<sup>85</sup> It can be argued that, for example, the terms and condition of GlaxoSmithKline purport to confer a benefit on the supplier's employees as a third party. An example of this are the clauses in their terms and conditions which state that the supplier warrants that 'it does not use forced labour in any form' and that it 'complies with the laws on working hours...in the countries in which it operates.' As these clauses clearly refer to the working conditions that the supplier provides, its employees can be identified as the beneficiaries. However, in practice, this interpretation does not seem to have much of an impact, as this provision does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.<sup>86</sup> In fact, the assessment of the contractual documents from the 30 FTSE 100 companies shows that an exclusion clause in the terms and conditions seems to be common practice such as this one from GlaxoSmithKline:

Except for any rights granted to GSK Affiliates, which the parties hereby designate as intended third party beneficiaries to the Agreement, no person who is not a party to the Agreement shall have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term.<sup>87</sup>

This situation means that the third parties who are the beneficiaries of the CSR clauses in the supply contracts do not derive a right to enforce these such as the right to form and to join a trade union, which is also found in the core ILO conventions. In practice, this exclusion of third party rights significantly limits the impact contract law as a tool for the promotion of CSR in global supply chains.

## **VI. Implications of the interaction of 'the international' with 'the national' in the context of CSR in global supply chains**

In this section, we will discuss the implications of this interaction of international soft law with national private contract law under four headings: first, the hybridisation of law in this system of CSR promotion; second, the role that TNC home-States play for the use of contract law through legislation as their as legislative requirements can impact on the way how TNCs choose to incorporate CSR issues into their supply chain contracts (i.e. in a more or less

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<sup>85</sup> *Prudential Assurance Co Ltd v Ayres* [2007] EWHC 775 (Ch); [2007] 3 All ER 946.

<sup>86</sup> Contracts (Rights of Third Parties) Act 1999, s2. See also: N Andrews, 'Strangers to Justice No Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999 and its Implications for Commercial Contracts' (2000) LMCLQ 540, 545.

<sup>87</sup> GlaxoSmithKline, GlaxoSmithKline Terms and Conditions of Purchase, section 25 ('General').

stringent way); third, the implications for the respective roles of private law and for public international law; fourth, the significance of enforcement mechanisms.

## **1. Hybridisation**

The interaction of public international law and national contract law creates a hybrid regulatory system.<sup>88</sup> The reference to hybrid regulatory system means a system in which different forms of regulation interact, such as private law, public law, soft and hard law standards developed by international organisations and private regulation by and between companies. Heldeweg notes that the characteristic feature of such a system is ‘a mix of origins.’<sup>89</sup> This hybridisation of CSR regulation is particularly based on the fact that contracts between private parties can give binding legal effect to CSR standards that are otherwise not binding on the parties. In this regulatory framework, we can observe that various regulatory models such as direct regulation by government, regulation by contract and outsourcing of regulatory functions to third parties, coexist. This bears witness of a move from soft to hard law regulation of CSR without direct imposition by the State.

Within this system, the way CSR is incorporated into supply contracts and the way such contractual terms are monitored and enforced depends on the private parties. This shows that the hybrid system not only needs external steering through home-State legislation, but also effective enforcement mechanisms to hold TNCs accountable for the way they purport to promote CSR across their supply chains. Legislation by the home-States of TNCs steers how these companies make use of their contractual power to harden international CSR standards.<sup>90</sup> This system can thus create an accountability framework for the global supply chains. Whether or not contractual CSR clauses between buyers and suppliers are actually enforced, is an issue that is addressed below. In any case, this hybrid system can contribute towards filling the regulatory gaps for CSR in global supply chains.<sup>91</sup>

## **2. The role of the home-States of TNCs**

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<sup>88</sup> See for a discussion of the term ‘hybrid’ in relation to regulation: M Vrielink, C van Montfort, M Bokhorst, ‘Codes as Hybrid Regulation’ in D Levi-Faur (ed), *Handbook on The Politics Of Regulation* (Edward Elgar 2011) para 35.5.2. See also: A Kun, ‘From transnational soft law to national hard law? – regulating supply chains’ (2015) 8 *Pecsi Munkajogi Kozlemenyei* 53.

<sup>89</sup> MA Heldeweg, ‘Hybrid Regulation as a Legal Design Challenge’ in N Lemay-Hébert and R Freedman (eds) *Hybridity: Law, Culture and Development* (Routledge 2017) 105.

<sup>90</sup> See G LeBaron, A Rühmkorf, ‘Steering CSR through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance’ (2017) 8 (S3) *Global Policy* 15.

<sup>91</sup> See M P Vandenberg, ‘The New Wal-Mart Effect: The Role of Private Contracting in Global Governance’ (2007) 54 *UCLA L Rev* 913, 919.

The second important implication of this interaction of international soft law and national contract law is that the home-States of TNCs assume a significant role in the hybrid regulatory system. They are important for the effectiveness of the hybrid system of promoting CSR as their laws have the capacity to steer the way Western TNCs use their contractual power in supply chain contracts by ‘inducing’ them to promote CSR in their private contracts.<sup>92</sup>

By establishing a statutory requirement to deal with CSR home-State legislation can help to overcome the ‘fragmented approach’ towards a level-playing field where the TNCs have to promote CSR in a more uniform way. In recent years, home-States of TNCs have increasingly passed laws that impact CSR issues in global supply chains.<sup>93</sup> The majority of such laws are transparency laws, but we see a continuum of different types of laws that affect different issues (e.g. modern slavery, bribery) and have different levels of stringency (ranging from soft disclosure laws to stringent corporate criminal liability).<sup>94</sup>

In most cases, the home-States are ‘regulating self-regulation.’<sup>95</sup> For example, the UK Modern Slavery Act leaves it to companies how they deal with modern slavery and trafficking. But there are examples of more stringent forms of regulation such as the UK Bribery Act 2010 and the 2017 French *devoir de vigilance* law where due diligence requirements are imposed on companies (although indirectly in the case of the UK Bribery Act, but still in a stringent form as a defence to a corporate offence). Thus far, there is little research on the question how different forms of home-State legislation impact private governance relations between buyers and suppliers. A recent small-scale study, co-authored by one of the two authors of this chapter, compared the way 25 FTSE 100 companies deal with bribery and modern slavery in their corporate documents respectively indicates that

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<sup>92</sup> See for a discussion of extraterritorial legislation: A de Jonge, *TNCs and International Law: Accountability in the Global Business Environment* (Edward Elgar 2011) 91-126.

<sup>93</sup> A recent study found that national governments have passed 19 pieces of national legislation in the last few years which are aimed at combatting the business of forced labour in global supply chains. See N Phillips, G LeBaron, S Wallin, ‘Mapping and Measuring the Effectiveness of Labour-Related Disclosure Requirements for Global Supply Chains’ (ILO, Geneva, 2016).

<sup>94</sup> See A Rühmkorf, ‘From Transparency to Due Diligence Laws? Variations in Stringency of CSR Regulation in Global Supply Chains in the ‘Home State’ Of Multinational Enterprises’ in J du Plessis, U Varottil, J Veldman (eds), *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Springer 2018) 177.

<sup>95</sup> One perspective on this phenomenon is that of meta-regulation. Parker understands meta-regulation as the state regulating its own regulation as well as any form of regulation that regulates any other form of regulation, for example legal regulation of self-regulation, non-legal methods of ‘regulating’ internal corporate self-regulation or management and the regulation of national law-making by transnational bodies, see C Parker, ‘Meta-regulation: Legal accountability for corporate social responsibility’ in D McBarnet, A Voiculescu and T Campbell (eds), *The new corporate accountability: Corporate social responsibility and the law* (CUP 2007) 210.

stronger home-State laws on bribery seem to result in stricter corporate policies on bribery than on modern slavery.<sup>96</sup> This, in turn, raises the question how those policies translate into business practices. More research is therefore needed to analyse the interaction of public and private governance and, in particular, to analyse what kind of public governance leads to more effective forms of private CSR promotion.

### **3. Implications for the respective roles of private law and for public international law**

The increasing frequency with which businesses are incorporating or referencing global human rights standards or social sustainability principles in their supply chain contracts indicates progress towards truly sustainable business from both a social and environmental perspective although the question remains to what extent companies walk their talk, i.e. do the TNCs that incorporate CSR standards into the contracts with their suppliers also ensure that these principles are followed throughout their supply chain or do they rather use these standards for PR reasons. The trend recognises the growing understanding of the role played by business in respecting the rights of individuals and preventing human and labour rights abuse in concert with the State's duty to do so.<sup>97</sup> However, for the same reason that the implementation of human rights treaties has been ineffective, international standards as a reference point alone will be ineffective unless backed up by strong methods of redress. Contract law provides at least some potential measure of consequence for a supplier failing to uphold the referenced standards.

It is, however, an imperfect response for a number of reasons. Firstly, private law, contract or otherwise, was not designed to assume a public, regulatory function and may be ill-equipped to do so, particularly when the alleged conduct is legal in one State and not in another. For example, the minimum child labour age or working hours standards differ greatly among States. Secondly, a contract claim will only yield a result for the corporate claimant. Individuals remain victims without redress and the loss of the supply contract could have far-reaching repercussions for individuals suddenly faced with no employment as opposed to employment in substandard conditions. Finally, contract dispute decisions are not designed to be determined based on the perceived breach of a social standard which is not perfectly defined. Where contracts generally demand precision, human rights standards are framed in imprecise terms by necessity. Thus, while contracts present one of the best options from the

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<sup>96</sup> G LeBaron, A Rühmkorf, 'Steering CSR through Home State Regulation'.

<sup>97</sup> See the 'protect, respect, remedy' framework in the UN Guiding Principles on Business and Human Rights.

point of holding businesses to account for poor business practices, the value to the rights holder remains enigmatic.

Equally, this hybrid system has implications for the role of private law. In this hybrid system, private parties act as the regulators that use private law, including contract law, as the instrument of regulation. Thus, private law assumes a regulatory function.<sup>98</sup> The way in which private law promotes CSR raises the question of whether the traditional understanding of private law as primarily regulating the legal relationships between private individuals, without pursuing any goals for the benefit of wider society, is still tenable. By providing mechanisms in contract law for the incorporation and enforcement of CSR commitments by private actors, private law indirectly also promotes the general public interest. The incorporation of CSR policies that we have analysed create a system of contract governance.<sup>99</sup> In the promotion of CSR, private law does not purely facilitate the use of individual rights between private parties, but it also de facto pursues public policy goals. This is a phenomenon that Smits refers to as ‘private law 2.0.’<sup>100</sup> The advantage of contract law here is its ability to overcome territorial boundaries as, in the supply chain contracts that are concluded between companies from different countries, its effects are not restricted to the territory of one country. It thus helps to close the governance gap of global supply chains. It is law that goes ‘beyond the State’<sup>101</sup> which contributes to the creation of a ‘private legal world order.’<sup>102</sup>

Thus, here we witness a changing role for private law, away from the pure facilitation of private relationships, to a more international and more public role with diverse uses of private law by private actors.<sup>103</sup> It can be argued that this changing role of private law has been pushed further by the UNGPs as they have led to a process where national governments are starting to contemplate how they can implement the recommendations of the Principles through national legislation and publishing National Action Plans.<sup>104</sup> Some of the recent

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<sup>98</sup> See H Collins, *Regulating Contracts* (OUP 1999) 56-93. See also K Peterkova Mitkidis, ‘Using Private Contracts for Climate Change Mitigation’ (2014) 2 *Groningen Journal of International Law* 65-76.

<sup>99</sup> See generally: S Grundmann, F Möslin, K Riesenhuber (eds) *Contract Governance: Dimensions in Law and Interdisciplinary Research* (OUP 2015).

<sup>100</sup> J M Smits, ‘Private Law 2.0: On the Role of Private Actors in a Post-National Society’ (Hague Institute for the Internationalisation of Law and Eleven International Publishing, 2011).

<sup>101</sup> N Jansen & R Michaels (eds), *Beyond the State: Rethinking Private Law* (Mohr Siebeck 2008).

<sup>102</sup> S B Spießhofer, *Unternehmerische Verantwortung: Zur Entstehung einer globalen Weltordnung* (Nomos 2017) 593-596.

<sup>103</sup> See for a discussion of ‘regulatory contract law’: R Brownsword, R A.J. van Gestel, H-W. Micklitz, ‘Introduction – contract and regulation: changing paradigms’ in R Brownsword, R A.J. van Gestel, H-W. Micklitz, *Contract and Regulation: A Handbook on New Methods of Law Making in Private Law* (Edward Elgar 2017).

<sup>104</sup> See, for example, HM Government, ‘Good Business: Implementing the UN Guiding Principles on Business and Human Rights’ (Updated May 2016, Cm 9255).

home-State laws on CSR in global supply chains such as nonfinancial information disclosure laws are, therefore, at least indirectly, a consequence of this process. This means that although the UNGPs contain only recommendations, they are a key element of the interaction between international standards and national law considered here. Therefore, this international standard has directly impacted the way private law is used to pursue the recommendations set out therein.

#### **4. Enforcement is central for the effectiveness of this international – national regime**

Ultimately, the effectiveness of this hybrid system depends, to a large extent, on the issue of whether or not CSR obligations are enforced or, at least, potentially can be enforced. Whilst we have argued that a binding wording allows to verify breaches of contractual CSR obligations and thus gives the transnational corporation at the top of the chain a remedy for breach of contract, the situation for third parties is unsatisfactory. We argued that they could gain a right to enforce the contract which would make CSR clauses a much stronger tool in practice, but found that their rights are commonly excluded by contract. It is argued that this exclusion should no longer be possible. The present situation can ultimately result in a mockery of the contractual CSR clauses as such clauses can be used by TNCs as a pure public relations instrument with no danger of them being enforced by, for example, the employees of the suppliers.<sup>105</sup> The Contracts (Rights of Third Parties) Act 1999 makes it expressly possible for a third party to enforce a contractual term if the term purports to confer a benefit on him. If the parties do not want a third party to gain a right to enforce a contract, then they should choose not to include such a term. Otherwise, TNCs gain reputational benefits through their CSR policies whilst they do not risk any legal enforcement.<sup>106</sup>

## **VII. Conclusions**

This chapter demonstrates that through contract law international law and national law interact in the promotion of CSR in global supply chains. Contract law is the tool that gives otherwise non-binding international CSR standards binding legal effect. Whether or not the TNCs as the buyers in global supply chains decide to enforce the contractual CSR clauses is their choice. Our analysis of 30 FTSE 100 companies reveals that the most widely used international standards are the UDHR and the ILO core conventions, followed by the UN

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<sup>105</sup> See or a detailed discussion of third-party rights: A Beckers, *Enforcing Corporate Social Responsibility Codes* 147-148. Further, see chapter xx in this volume.

<sup>106</sup> See chapter xx in this volume, p. Xx.

Global Compact. There are also some, but fewer, references to the Ethical Trading Initiative Base Code, the UNGPs and the OECD Guidelines for Multinational Enterprises.

We find that private law is used to fill the gaps left by natural parameters of public international law in the area of CSR. The adjudicatory mechanisms of international law continue to focus on States and, in the realm of human rights, are open to individuals in claims against States. As it is at present not possible to access justice against a transnational corporation directly at the international level, other legal approaches, including tort and contract law, are necessary for the development of an accountability framework. The question of whether or not such contractual CSR terms are, in fact, enforceable depends on two key issues: first, the incorporation of the CSR clauses into the contract; second, the way they have been drafted (i.e. are these clauses binding, precisely worded and not just aspirational?). This chapter suggests that the contractual reach of the CSR clauses and their enforcement is limited in practice as the CSR clauses are only directly effective between TNCs and their direct suppliers. They cannot impose a contractual obligation onto third parties outside the contract due to the privity of contract doctrine. Sub-contracting therefore constitutes a significant challenge for the promotion of CSR through contract. Also, the right of enforcement is, in practice, limited to the parties of the contract – the transnational corporation and their direct suppliers. Third parties such as the employees of the supplier who are supposed to benefit from the contractual CSR clauses can gain a right of enforcement in English law in accordance with the Contracts (Rights of Third Parties) Act 1999, but our research demonstrates that this right is usually excluded in the supply contracts.

Despite these limitations, the use of international law in the supply chain, governed by national contract law, is a significant phenomenon: first, it leads to a hybrid system of promoting CSR where different regulatory techniques and forms of regulation interact – national and international law, hard and soft law, public and private law, public regulation with private regulation. The various interactions within this hybrid system are ripe for further research. Second, home-State legislation is central for the effectiveness of this hybrid system of promoting CSR in global supply chains; Third, the interaction of public international law and contract law that we have discussed here is part of a broader trend that sees the roles of these areas changing. Finally, this chapter has demonstrated that contract law is one potential option for developing the common understanding of CSR and an alternative route to access justice for rights breaches when it is otherwise denied.

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